Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1994

DYNAMIC CONSTRUCTION COMPANY

and

ANDREW M. KOWAL,

Petitioners,

V.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robin M. Kennedy, Esq.
Attorney for Petitioners
4806 High Oaks Boulevard
Toledo, Ohio 42623
Telephone: (419) 537-2944
Telecopier: (419) 537-2821

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QUESTIONS PRESENTED

I. Did the Sixth Circuit err in sanctioning the District Court's error in holding Mr. Kowal, a pro se litigant, to the standards of an attorney?

II. Did the Sixth Circuit err in sanctioning the District Court's failure and refusal to apply Michigan law governing attorney fee awards?

LIST OF PARTIES

The parties to the proceedings are Petitioners and Respondent as they appear on the cover sheet.

Petitioner Dynamic Construction Company does not have any parent companies or nonwholly-owned subsidiaries.

Petitioners were represented by Petitioner Andrew M. Kowal pro se/in pro per.

Respondent was represented by Lita Masini Popke of Mager, Monahan, Donaldson & Alber, P.C., 2400 First National Building, Detroit, Michigan 48226. (Note: Ms. Popke is now associated with Weisman, Trogan, Young & Schloss, P.C., 30100 Telegraph Rd., Suite 428, Birmingham, MI, 48025.)

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STATUTES

28 U.S.C. § 1254(1)

28 U.S.C. § 1291

28 U.S.C. § 1332(a)(1)

RULES

E. D. Mich. Loc. R. 7.1(h)(3)

Fed. R. Civ. P. 8(a)(2)

Fed. R. Civ. P. 8(f)

Fed. R. Civ. P. 59(e)

Fed. R. Civ. P. 60(b)

Petitioners Dynamic Construction Company and Andrew M. Kowal respectfully pray that a writ of certiorari issue to review the *per curiam* opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on January 9, 1995 and the order denying Petitioners' petition for rehearing entered on March 15, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit and the order denying Petitioners' petition for rehearing are unpublished and are reprinted in the Appendix hereto.

The order of the United States District Court for the Eastern District of Michigan, Southern Division, and the District Court's memorandum opinion and order denying Petitioners' motion for reconsideration are set forth in the Appendix hereto.

JURISDICTION

Jurisdiction of the United States District Court for the Eastern District of Michigan, Southern Division, is pursuant to 28 U.S.C. § 1332(a)(1), diversity of citizenship.

The United States Court of Appeals for the Sixth Circuit denied Petitioners' appeal on the issues on January 9, 1995 and denied Petitioners' petition for rehearing on March 15, 1995. Petitioners invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. § 1291.

Petitioners invoke the jurisdiction of this Court to review the judgments of the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in the case.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit's affirmance of the District Court for the Eastern District of Michigan, Southern Division's entry of a judgment for attorney fees against Petitioners Dynamic Construction Company ("Dynamic") and Andrew M. Kowal ("Mr. Kowal") in an indemnity action initiated by Respondent Insurance Company of North America ("INA"). Petitioners respectfully request the Court's indulgence in reviewing a somewhat complex and lengthy Statement of the Case, which Petitioners deem essential to the Court's understanding of the bases for Petitioners' reasons for seeking a writ of certiorari.

Mr. Kowal is the President and sole stockholder of Dynamic. Dynamic has been involved in public works projects requiring performance bonds since 1972. Mr. Kowal purchased the necessary bonds from Petitioner Insurance Company of North

America ("INA").

As partial consideration for the issuance of performance bonds in favor of Dynamic, INA required Dynamic, Mr. Kowal and Mr. Kowal's wife, Margaret (also an officer of Dynamic), to execute indemnity agreements in 1975. The first indemnity agreement, dated April 8, 1975, was executed by Mr. and Mrs. Kowal in favor or INA ("Kowal Agreement"). The second indemnity agreement, dated July 30, 1975, was executed by Dynamic in favor of INA ("Dynamic Agreement").

The two indemnity agreements essentially state that Mr. and Mrs. Kowal, individually, and Dynamic will indemnify INA against all claims, demands, losses, etc., including attorney fees, that INA may incur "by reason of" or "by reason of executing" the bonds in favor of Dynamic. The Dynamic Agreement provides for transfer of all of Dynamic's contract-related assets to INA in

the event of Dynamic's breach, default or abandonment of the contract to which the bond relates. Both indemnity agreements provide that the indemnitors are liable for INA's attorney fees only if INA is required to take legal action to enforce the indemnitor's covenant to cover INA's reserve on demand; and both indemnity agreements limit the indemnitor's liability for claims, demands, losses, attorney fees, etc., to those paid and/or incurred by INA "in good faith."

On October 1, 1981, INA issued what was to become its final performance bond on behalf of Dynamic. The bond in favor of the Village of Archbold, Ohio ("Archbold") guaranteed Dynamic's performance on its contract with Archbold and further guaranteed that all subcontractors, materialmen and laborers would be paid.

On June 21, 1982, Dynamic entered into a contract with B.I.F. Division of General

Signal Controls, Inc. ("B.I.F.") to perform certain work and to furnish certain goods and equipment in connection with the Archbold contract.

In September of 1983, a lower shear pin broke on a B.I.F.-supplied valve buried 30 feet below grade on the Archbold project. Dynamic backcharged B.I.F. its cost to repair the valve -- $28,422.04 -- and B.I.F. made a claim against the performance bond issued by INA. INA had exclusively bonded all of Dynamic's projects until February of 1984, but INA refused to underwrite any further bonds for Dynamic after Dynamic reported the B.I.F. loss, which was Dynamic's first loss on a project since Mr. Kowal founded Dynamic in 1971.

B.I.F. eventually filed suit against Dynamic and INA in the United States District Court for the Southern District of New York. As a result of that litigation, INA paid B.I.F. $33,635.34 on May 20, 1988.

INA then filed the indemnification action against Dynamic and Mr. and Mrs. Kowal from which this proceeding arises -- Case No. 88-CV-72993-DT, which was filed in the U.S. District Court for the Eastern District of Michigan, Southern Division, on July 22, 1988. INA sought indemnity to recover the amount of its payment to B.I.F. plus attorney fees sustained as a result of having executed or procured the execution of the bond.

In ruling on INA's motion for summary judgment, the District Court found Dynamic and Mr. and Mrs. Kowal to be jointly and severally liable for INA's payment to B.I.F., plus attorney fees. Following briefing and argument on the issue of the amount of attorney fees due INA, the Court entered judgment in favor of INA in the amount of $29,102.95 on June 19, 1989, which included attorney fees in the amount of $3,395.40.

Mr. Kowal then filed a motion to amend judgment and INA countered with a motion seeking additional attorney fees. On September 19, 1989, the Court entered a further judgment in favor of INA in the amount of $2,784.36, which included an award of attorney fees in the amount of $2,292.00.

Mr. Kowal does not dispute INA's entitlement to judgment on its principal claim and the attorney fees expended by INA in order to obtain that judgment. Both the $29,102.95 judgment and the $2,784.36 judgment have been satisfied. Mr. Kowal does, however, take issue with INA's demand that Mr. Kowal pay the attorney fees incurred in the course of INA's efforts to satisfy the judgments from Mr. Kowal's personal assets. It is those attorney fees which are central to this proceeding.

INA sought post-judgment attorney fees incurred from September 7, 1989 through June 5, 1991 in separate motions for costs and

attorney fees filed on June 8, 1990 and September 16, 1991 (amended on September 20, 1991).

On behalf of all the defendants, Mr. Kowal filed separate responses opposing INA's motions for costs and attorney fees on July 31, 1990 and October 4, 1991. Mr. Kowal's responses were extensive and included numerous detailed arguments, several of which are summarized below.

Several of Mr. Kowal's arguments are particularly pertinent to this proceeding, the first being that INA cannot recover its post-judgment attorney fees from Dynamic and/or Mr. and Mrs. Kowal pursuant to the indemnity agreements because those attorney fees cannot be deemed to have been incurred "by reason of" or "by reason of executing" the Archbold bond.

Mr. Kowal also argued that INA should have satisfied its principal judgment from Dynamic's assets transferred to INA pursuant

to the indemnity agreements rather than seeking to collect the judgment from Mr. Kowal individually.

Mr. Kowal further argued that the fact that the indemnity agreements render the indemnitors liable for INA's attorney fees only if INA is required to take legal action to enforce the indemnitors' covenant to cover INA's reserve on demand precludes INA from recovering post-judgment attorney fees related to collection actions directed at Mr. Kowal individually.

Mr. Kowal also argued that INA's post-judgment collection actions against him violated the "good faith" provisions of the indemnity agreements. More specifically, Mr. Kowal noted that Judges Feikens and Duggan, in an earlier District Court action initiated against Dynamic and Kowal by INA arising out of the same indemnity agreements (Case No. 86-CV-71902-DT), held that INA could collect only "reasonable" attorney

fees incurred "in good faith" regardless of whether the fees were incurred in connection with a bond. In that case, Judge Duggan ruled that each party should be responsible for its/his attorney fees incurred to collect attorney fees as a cost of doing business.

On April 2, 1992, the District Court denied INA's two motions for costs and attorney fees, without prejudice, on the grounds that INA's motions were not supported by sufficient documentation.

On April 29, 1992, INA filed a motion for leave to file a late motion for reconsideration and the motion for reconsideration. On May 20, 1992, Dynamic and Mr. Kowal filed a response to INA's motion to extend the deadline for filing a motion for reconsideration. Petitioners objected to, inter alia, INA's lack of documentation and substantiation of its attorney fees and INA's efforts to recover

attorney fees for appellate work.

On October 20, 1992, INA filed a new motion for costs and attorney fees reiterating its request that Kowal and Dynamic be charged with INA's attorney fees incurred from September 7, 1989 through June 5, 1991, as reflected in INA's 1990 and 1991 motions, and seeking additional fees for the time period from June 6, 1991 through October 12, 1992. In total, INA's October 20, 1992 motion asked for attorney fees in the amount of $19,590.56.

As a pro se litigant, Mr. Kowal was unfamiliar with the intricacies of the procedural rules and his obligations thereunder. Despite his inquiries to the personnel in the District Court Clerk's Office, Mr. Kowal did not understand that INA could file a new motion for attorney fees while its motion for reconsideration of the order denying INA's 1991 and 1992 motions was pending. Mr. Kowal likewise did

not understand that the Court would not consider his responses to INA's 1990 and 1991 motions unless he specifically incorporated those responses into his response to the October 20, 1992 motion even though INA's 1992 motion for attorney fees included references to the 1990 and 1991 motions and sought attorney fees for the time periods reflected in the 1990 and 1991 motions.

Mr. Kowal's misunderstandings ultimately became "mistakes" fatal to Mr. Kowal and Dynamic's opposition to INA's motion for post-judgment attorney fees. On October 30, 1992, Mr. Kowal filed a short response to INA's October 20, 1992 motion for costs and attorney fees. Believing that he was responding to a motion for reconsideration of the denial of INA's 1990 and 1991 motions entered on April 2, 1992, Mr. Kowal argued that the October 20, 1992 motion should be stricken as untimely. Mr.

Kowal did not reiterate the substantive arguments presented in his extensive responses to INA's 1990 and 1991 motions for attorney fees. He did, however, raise the issue of the "reasonableness" of INA's fees by objecting to INA's alleged fees "for matters already paid by earlier orders of this court and matters that relate solely to Plaintiff's legal fees in the U.S. Court of Appeals."

On January 7, 1993, the District Court entered an order granting INA's October 20, 1992 motion for costs and attorney fees in the amount of $19,590.56. The District Court specifically acknowledged Mr. Kowal's mistaken belief that he was responding to a motion for reconsideration. Being fully aware of Mr. Kowal's mistake, the District Court nevertheless summarily dismissed Mr. Kowal's timeliness argument. The District Court likewise summarily dismissed Mr. Kowal's "reasonableness" argument in one

sentence: "Plaintiff has a right to attorney fees for appellate work under the Agreement of Indemnity." The District Court did not present any analysis of the terms of the indemnity agreements in support of its award of post-judgment attorney fees to INA; and the District Court did not consider any of the substantive legal arguments raised in Mr. Kowal's responses to INA's 1990 and 1991 motions.

In other words, the District Court never reached or addressed the merits of Mr. Kowal's opposition to INA's motions for post-judgment attorney fees. Instead, the District Court elected to seize the opportunity presented by Mr. Kowal's procedural mistake to make a summary decision in favor of INA.

On January 22, 1993, Mr. Kowal filed a timely motion for rehearing or reconsideration to amend the January 7, 1993 order. Mr. Kowal noted the procedural

history of INA's quest for attorney fees. Substantively, Mr. Kowal argued: 1) that INA's October 20, 1992 motion for attorney fees did not include sufficient documentation of the reasonableness of the fees, either as required by Michigan case law and the Michigan Rules of Professional Conduct or as mandated by the District Court in denying INA's 1990 and 1991 motions for attorney fees; and 2) that at least a portion of the attorney fees sought by INA were unnecessary, unreasonable, incorrectly calculated and/or excessive. Mr. Kowal concluded his arguments by asking for an evidentiary hearing to determine the amount by which the January 7, 1993 order of attorney fees in the amount of $19,590.56 should be reduced.

On February 12, 1993, Mr. Kowal filed a supplemental motion for rehearing or reconsideration to amend the January 7th order. Mr. Kowal's supplemental motion

reiterated, and incorporated by specific reference, the arguments presented in Mr. Kowal's responses to INA's 1990 and 1991 motions for attorney fees. (See discussion above.) Mr. Kowal also reiterated his arguments regarding the moving party's burden of establishing the reasonableness of attorney fees and the unnecessary and/or excessive nature of some of INA's attorney fees.

In his supplemental motion for reconsideration, Mr. Kowal noted that the District Court never conducted an independent in-depth analysis of the terms and language of the indemnity agreements to determine whether INA was entitled to recover its post-judgment attorney fees from Dynamic and/or Mr. Kowal. (See discussion of Mr. Kowal's analysis of the indemnity agreements above.)

Perhaps most significantly, Mr. Kowal's supplemental motion for reconsideration

pointed out Mr. Kowal's misunderstanding regarding the effect of INA's filing a new motion for attorney fees before receiving a ruling on its motion for reconsideration of the District Court's denial of INA's 1990 and 1991 motion for attorney fees. Mr. Kowal noted that he did not understand that the District Court would rule on INA's October 20, 1992 motion for attorney fees without considering Mr. Kowal's responses to INA's 1990 and 1991 motions for attorney fees.

Interestingly, INA did not file any response to Mr. Kowal's motion and supplemental motion for reconsideration.

On April 5, 1993, the District Court entered its memorandum opinion and order denying Dynamic and Mr. Kowal's motion for reconsideration.

The District Court did not even consider Dynamic and Mr. Kowal's supplemental motion for reconsideration

because Mr. Kowal did not file it within 10 days of the January 7, 1993 order. In fact, the District Court summarily ordered that the supplemental motion for reconsideration and brief in support be stricken from the record as untimely.

The District Court likewise summarily dismissed Dynamic and Mr. Kowal's argument that the attorney fees at issue were not reasonable, as follows:

> "Although the Court in its January 1993 Order did not expressly state that the costs and the attorney fees sought by plaintiff were reasonable, it is implicit in the Order that the Court found the costs and the attorney fees to be reasonable. If the Court did not find the fees and costs to be reasonable, the Court would not have issued an Order awarding such costs and attorney fees."

Once again, the District Court refused to give any serious consideration to Mr. Kowal's substantive arguments.

On May 3, 1993, Mr. Kowal timely filed a notice of appeal to the Sixth Circuit.

Mr. Kowal's brief and reply brief in the Sixth Circuit reiterated essentially all of the arguments Mr. Kowal asserted in the District Court. The reply brief focused on the District Court's failure (and refusal) to examine the 1975 indemnity agreements, consider the relevant case law, and conduct an evidentiary hearing before awarding post-judgment attorney fees to INA.

Mr. Kowal's efforts to persuade the Sixth Circuit to do what the District Court failed and refused to do proved equally fruitless. On January 9, 1995, the Sixth Circuit entered its per curiam opinion dismissing Mr. Kowal's arguments on the issue of attorney fees and affirming the District Court's $19,540.56 award of attorney fees to INA in three painfully short (one- and two-sentence) paragraphs. The Sixth Circuit held: 1) that Mr. Kowal waived his appeal on the issue of the reasonableness of INA's attorney fees

because he did not raise it until he moved for reconsideration; 2) that the District Court did not abuse its discretion in awarding INA its requested attorney fees because the fees were reasonable pursuant to the Sixth Circuit's independent review of the itemized attorney fees; and 3) that Mr. Kowal waived his appeal on all of the other issues addressed in his briefs because he did not raise those issues until he moved for reconsideration.

On March 8, 1995, Mr. Kowal made a final effort to persuade the Sixth Circuit to reach and address the merits of his substantive arguments in opposition to INA's October 20, 1992 motion for post-judgment attorney fees. In his petition for rehearing, Mr. Kowal fully explained his mistake in failing to reiterate all of the defenses and objections expressed in his responses to INA's 1990 and 1991 motions for attorney fees when he responded to INA's

October 20, 1992 motion for attorney fees. Mr. Kowal argued that his procedural errors in the District Court, which occurred because he was unrepresented by counsel, constituted mistake, inadvertence and excusable neglect entitling Dynamic and Mr. Kowal to a review of their substantive arguments in opposition to INA's motions for attorney fees.

On March 15, 1995, the Sixth Circuit entered an order denying Dynamic and Mr. Kowal's petition for rehearing, without opinion. Accordingly, Dynamic and Mr. Kowal seek a writ of certiorari to review the Sixth Circuit's rulings.

REASONS FOR GRANTING THE WRIT

Dynamic and Mr. Kowal submit that this honorable Court should grant the writ of certiorari for two reasons, which arise out of the Sixth Circuit's unwarranted and substantial departure from the accepted and usual course of judicial proceedings in order to sanction a similar departure by the District Court: First, the Sixth Circuit erred in sanctioning the District Court's error in holding Mr. Kowal, a pro se litigant, to the standards of an attorney and seizing on Mr. Kowal's inadvertent and excusable procedural mistake as the basis for failing and refusing to consider Mr. Kowal's meritorious substantive arguments; and second, the Sixth Circuit erred in sanctioning the District Court's failure and refusal to apply Michigan law mandating that INA establish the "reasonableness" of its attorney fees and that the District Court consider specific factors and conduct an

evidentiary hearing before awarding attorney fees to INA. Following is a detailed analysis of the reasons Dynamic and Mr. Kowal believe that a writ of certiorari should issue.

I. The Sixth Circuit Erred in Sanctioning the District Court's Error in Holding Mr. Kowal, a Pro Se Litigant, to the Standards of an Attorney.

This Court has held that a pro se litigant should not be held to the standards of an attorney. Haines v. Kerner, 404 U.S. 519, 520 (1972). Fed. R. Civ. P. 8(f) mandates that "all pleadings shall be construed so as to do substantial justice." The Federal Rules of Civil Procedure generally reject the principle that pleading is "a game of skill in which one misstep by counsel may be decisive to the outcome" in favor of the principle that "the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957) (citation omitted); Fed. R.

Civ. P. 8(a)(2) and 8(f). The District Court's general disdain for Mr. Kowal and the District Court's refusal to excuse Mr. Kowal's procedural mistake in failing to reiterate his substantive arguments in response to INA's October 20, 1992 motion for attorney fees are inexcusable in light of these principles. The Sixth Circuit's summary decisions sanctioning the District Court's actions warrant review by this Court.

Had the District Court granted INA's 1992 motion for attorney fees after considering Mr. Kowal's extensively argued defenses and objections, Petitioners would not be seeking a writ of certiorari from this Court. But Mr. Kowal deems it wholly inappropriate, and violative of his constitutional rights, that both the District Court and the Sixth Circuit used (and even seized upon) his procedural mistakes as an excuse to summarily dismiss

almost all of his substantive arguments.

The District Court knew, and specifically acknowledged in its January 7, 1993 order, that Mr. Kowal erroneously believed that he was responding to INA's motion for reconsideration of the District Court's denial of its 1991 and 1992 motions for attorney fees rather than to INA's 1992 motion for attorney's fees. The District Court also knew that Mr. Kowal had vigorously opposed the 1991 and 1992 motions in two extensive papers. The District Court abused its discretion by not giving Mr. Kowal, who was unrepresented by counsel, the benefit of the doubt and by not considering all of Mr. Kowal's substantive arguments in opposition before ruling on INA's motion for attorney fees. The Sixth Circuit should not have sanctioned such a departure from the usual course of judicial proceedings.

The District Court's decision to strike Mr. Kowal's supplemental motion for

reconsideration as untimely is particularly troublesome. It seems that the District Court was reaching for reasons to justify granting INA's motion without analyzing the many issues raised by Mr. Kowal in opposition.

Mr. Kowal did not formally bring his mistake to the District Court's attention until he filed a supplemental motion for reconsideration. Had the District Court considered the supplemental motion, it could only have ruled that Mr. Kowal qualified for reconsideration under Local Rule 7.1(h)(3), which provides as follows:

> Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

E.D. Mich. Loc. R. 7.1(h)(3) (emphasis added).

Mr. Kowal's procedural mistake was a "palpable defect" (acknowledged by the District Court) which misled the Court to believe that Mr. Kowal had abandoned the bulk of his objections and defenses to INA's quest for post-judgment attorney fees. More fatally, the mistake led Mr. Kowal to believe that the District Court would consider the arguments set forth in his responses to INA's 1990 and 1991 motions for attorney fees before ruling on the 1992 motion.

Had the District Court considered the substantive arguments set forth in the supplemental motion for reconsideration and those incorporated by reference to Mr. Kowal's responses to INA's earlier motions for attorney fees, it could only have concluded that a different disposition of the case must result from a correction of

Mr. Kowal's excusable procedural mistake. The District Court's denial of Dynamic and Mr. Kowal's motion for reconsideration was a clear error which should not have been sanctioned by the Sixth Circuit.

The District Court had the option to consider the supplemental motion for reconsideration as a motion for relief from judgment under Fed. R. Civ. P. 60(b), which provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

Even though Mr. Kowal did not specifically cite Rule 60(b), his mistake in failing to assert substantive objections to INA's 1992 motion for attorney fees is exactly what Rule 60(b) contemplates. Given that Mr.

Kowal was unrepresented by counsel, the District Court could -- and should -- have considered Mr. Kowal's "mistake" argument under Rule 60(b) rather than strike it as untimely under Rule 59(e). The Sixth Circuit's further refusal to acknowledge Petitioners' entitlement to relief from the District Court's January 7, 1993 award of attorney's fees to INA compounded the injustice to Mr. Kowal. This Court should exercise its power of supervision to reverse the injustice.

In summary, the District Court abused its discretion by holding Mr. Kowal to the standards of an attorney and by using Mr. Kowal's procedural mistake as an excuse to rule against him without considering the merits of his objections to INA's seemingly endless quest to recover post-judgment attorney fees from Mr. Kowal personally; and Mr. Kowal demonstrated that reconsideration of the District Court's granting of INA's

1992 motion for attorney fees was necessary to correct a palpable and outcome-determinative defect by which the District Court and the parties were misled. The Sixth Circuit compounded, and sanctioned, the District Court's unwarranted and substantial departure from the accepted and usual course of judicial proceedings by failing to "cure" the District Court's unjust treatment of Mr. Kowal. Mr. Kowal has been denied the opportunity to have the issue of post-judgment attorney fees decided on the merits in contravention of the spirit of the Federal Rules of Civil Procedure and the tenets applicable to pro se litigants. Accordingly, this Court should exercise its power of supervision to review the proceedings in the Sixth Circuit.

II. The Court of Appeals Erred in Sanctioning the District Court's Failure and Refusal to Apply Michigan Law Governing Attorney Fee Awards.

A district court abuses its discretion

when it relies on clearly erroneous findings of fact, when it improperly applies the law, or when it uses an erroneous legal standard. Christian Schmidt Brewing v. G. Heileman Brewing, 753 F.2d 1354, 1356 (6th Cir.), cert. dismissed, 469 U.S. 1200 (1985) (citations omitted). The District Court abused its discretion in failing and refusing to apply Michigan law which requires a party seeking attorney fees to prove that the fees sought are reasonable and mandates that the trial court consider several factors and conduct an evidentiary hearing on the issue of reasonableness before awarding attorney fees, as will be discussed below.

Under Michigan law, a party seeking reimbursement for attorney fees must provide the court with the necessary evidence to determine whether the requested fees are reasonable. Petterman v. Haverhill Farms, Inc., 125 Mich. App. 30, 33; 335 N.W.2d 710

(1983). The burden of proving that the services rendered were necessary, i.e., that the fees charged for the services are reasonable, rests with the party seeking compensation. In re Irwin Estate, 162 Mich. App. 522, 530, 413 N.W.2d 37 (1987). An itemized bill is not in itself sufficient to establish the reasonableness of attorney fees. Papo v. Aglo Restaurants of San Jose, Inc., 149 Mich. App. 285, 386 N.W.2d 177 (1986). A court considering a motion for attorney fees is required to make an independent review and determine what constitutes a reasonable attorney fee on the basis of the record of the case. Detroit v. Cusmano & Son, Inc., 184 Mich App. 507, 513-514, 459 N.W.2d 3 (1989).

The Michigan Supreme Court adopted several of the general standards set forth in Disciplinary Rule 2-106 of Michigan's Code of Professional Responsibility and Ethics for determining reasonable attorney

fees: 1) the professional standing and experience of the attorney; 2) the skill, time and labor involved; 3) the amount in question and the results achieved; 4) the difficulty of the case; 5) the expenses incurred; and 6) the nature and length of the professional relationship with the client. Wood v. DAIIE, 413 Mich. 573, 588, 321 N.W.2d 653 (1982). Although Disciplinary Rule 2-106(B) has been repealed, its successor -- Rule 1.5(a) of the Michigan Rules of Professional Conduct -- is substantially the same. In In re Condemnation of Property, 209 Mich. App. 336 (1995), the Michigan Court of Appeals adopted Rule 1.5(a)'s standards, including the extent of services actually performed. Id. at 341-343 (citing Detroit v. Larned Associates, 199 Mich. App. 36, 43, 501 N.W.2d 189 (1993).

When attorney fees are questioned, the trial court must hold an evidentiary hearing

and make findings of fact on the issue of the reasonableness of the attorney fees sought. Maple Hill Apartment Co. v. Robert W. Stine, AIA, 147 Mich. App. 687, 382 N.W.2d 849 (1985). Further, a party seeking attorney fees must provide a record from which an appellate court can determine how the trial court exercised its discretion. If such a record is not provided, an appeal will be remanded for further proceedings to prepare a record for the appellate court's use in reviewing the reasonableness of the attorney fees. Condemnation, supra, at 342-343; Redfern v. R. E. Dailey and Co., 146 Mich. App. 8, 379 N.W.2d 451 (1985).

The District Court did not make any findings of fact or conclusions of law explaining how the indemnity agreements provide the legal basis for granting post-judgment attorney fees to INA or how INA satisfied its burden of establishing the reasonableness of its attorney fees.

Instead, as discussed earlier in this Petition, the District Court summarily granted INA's motion for costs and attorney fees in the amount of $19,590.56, its only specific (but again summary) conclusion being that INA has a right to attorney's fees for appellate work pursuant to the indemnity agreements. The District Court abused its discretion by failing to acknowledge or apply controlling Michigan law. Schmidt Brewing, supra.

When Dynamic and Mr. Kowal moved for rehearing and reconsideration and challenged the reasonableness of the post-judgment attorney fees, the District Court responded that "it is implicit in the [January 7, 1993] Order that the Court found the costs and the attorney fees to be reasonable." The District Court arrived at that conclusion in further direct contravention of Michigan law and in contravention of the standard governing motions for

reconsideration, as discussed below.

The Federal Rules of Civil Procedure do not specifically provide for a motion for reconsideration. However, such a motion serves a legitimate and valuable role in certain situations. National Union Fire Ins. Co. v. Continental Illinois Corp., 116 F.R.D. 252, 253 (N.D. Ill. 1987) (citing Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)). Three major situations justify a court reconsidering an order: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error of law or fact or prevent manifest injustice. In re Oil Spill by Amoco Cadiz, 794 F. Supp. 261, 267 (N.D. Ill. 1992); Kern-Tulare Water Dist. v. Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), aff'd in part, rev'd in part, 928 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988).

The District Court properly considered Dynamic and Mr. Kowal's motion for rehearing or reconsideration under Fed. R. Civ. P. 59(e): The motion was served within ten days of the entry of the January 7, 1993 order and requested a substantive alteration in the judgment rather than just a correction of a clerical error or procedural order. However, the Sixth Circuit could and should have conducted a de novo review of the district court's denial of Dynamic and Mr. Kowal's motion for rehearing or reconsideration to determine if reconsideration was necessary in order to correct clear error of law or fact and/or prevent manifest injustice to Dynamic and Mr. Kowal. United States v. Garqano, 826 F.2d 610, 611 (7th Cir. 1987); Columbia Gas Transmission Corp. v. Limited Corp., 951 F.2d 110, 112 (6th Cir. 1991). The Sixth Circuit's failure to conduct a de novo review warrants this Court's intervention.

The Sixth Circuit also erred by deeming Dynamic and Mr. Kowal's appeal on the issue of reasonableness waived by virtue of their failure to raise the issue prior to moving for rehearing or reconsideration, for two reasons. First, Mr. Kowal raised the issue of the "reasonableness" of INA's fees in his response to INA's October 20, 1992 motion for attorney fees by objecting to INA's alleged fees for matters already paid pursuant to earlier orders and appellate matters. More importantly, and contrary to the rulings of both the District Court and the Sixth Circuit, Michigan law places no burden on a party opposing attorney fees to disprove, or even specifically challenge, the reasonableness of the fees. Rather, Michigan law places all of the burden on the party moving for attorney fees -- to establish reasonableness -- and on the trial court -- to conduct an evidentiary hearing and make specific findings of fact on the

issue of reasonableness. Both the District Court and the Sixth Circuit committed error warranting this Court's intervention by assigning to Mr. Kowal the burden of disproving the reasonablenss of the attorney fees sought by INA. This error is all the more reprehensible in light of Mr. Kowal's status as a pro se litigant, as discussed above.

In summary, the District Court abused its discretion by failing and refusing to apply a substantial body of case law governing the determination of attorney fee awards; and reconsideration of the District Court's granting of INA's 1992 motion for attorney fees was necessary in order to correct many clear errors of law and fact and prevent manifest injustice to Dynamic and Mr. Kowal. The Sixth Circuit compounded, and sanctioned, the District Court's unwarranted and substantial departure from the accepted and usual course

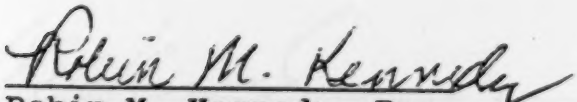
of judicial proceedings by failing to conduct a de novo review of the District Court's denial of Dynamic and Mr. Kowal's motion for rehearing or reconsideration before affirming the award of attorney fees to INA. Accordingly, this Court should exercise its power of supervision to review the proceedings in the Sixth Circuit.

CONCLUSION

The issues raised by Petitioners demonstrate that the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings and/or sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

Wherefore, Petitioners respectfully pray that this honorable Court will grant their Petition for a Writ of Certiorari.

Respectfully Submitted this 13th day of June, 1995.



Robin M. Kennedy, Esq.
Attorney for Petitioners
4806 High Oaks Boulevard
Toledo, Ohio 42623
Telephone: (419) 537-2944
Telecopier: (419) 537-2821

APPENDIX

The opinions issued by the Sixth Circuit Court of Appeals and the District Court for the Eastern District of Michigan, Southern Division, follow.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
United States Court of Appeals
Sixth Circuit

March 15, 1995

Docket Nos. 93-1640, 93-2105

D.C. No. 88-CV-72993-DT

Eastern District of Michigan,
Southern Division

INSURANCE COMPANY OF NORTH AMERICA

Plaintiff-Appellee

v.

ANDREW M. KOWAL

Defendant-Appellant

MARGARET A. KOWAL

Defendant

and

DYNAMIC CONSTRUCTION COMPANY

Defendant-Appellant

ORDER

BEFORE: NELSON, SUHRHEINRICH AND SILER, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellant,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

By: S/ "Leonard Green," Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
United States Court of Appeals
Sixth Circuit

January 9, 1995

Docket Nos. 93-1640, 93-2105

D.C. No. 88-CV-72993-DT

Eastern District of Michigan,
Southern Division

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellee,

v.

DYNAMIC CONSTRUCTION COMPANY and
ANDREW M. KOWAL,

Defendants-Appellants.

BEFORE: NELSON, SUHRHEINRICH and SILER,
Circuit Judges.

PER CURIAM. On January 7, 1993, the district court granted a motion for costs and attorney fees incurred by Insurance Company of North America between July 10, 1989, and October 12, 1992, in connection

with the company's efforts to recover moneys due it under an indemnity agreement. The amount awarded came to $19,540.56. A motion for reconsideration of the January 7 order was denied on April 5, 1993. These rulings are the subject of the appeal in Case No. 93-1640.

On June 4, 1993, the district court denied a request for an order directing that the award of costs and attorney fees be paid in installments pursuant to M.C.L. 600.6201 et seq. This ruling is the subject of the appeal in Case No. 93-2105.

We shall affirm each of the challenged orders.

I

These are the fourth and fifth appeals stemming from a summary judgment in which the district court enforced an indemnity agreement between plaintiff INA and defendants Dynamic Construction Company and Andrew Kowal. We summarize only those facts

believed necessary to an understanding of the issues raised in the current appeals.

Dynamic is a construction company owned by Mr. Kowal. The surety bonds that Dynamic routinely posted in the course of its business were written by INA. Before it would write the bonds, INA required Dynamic, Andrew Kowal, and Kowal's wife to execute agreements in which they promised to indemnify INA against any loss or damage arising from claims made under the bonds. The indemnity agreements specifically provided that the indemnitors' liability "include)s) all costs, expenses, and attorney's fees incurred or sustained by {INA] . . . ."

On October 1, 1981, INA issued a performance bond for Dynamic in favor of the Village of Archbold, Ohio. The bond guaranteed Dynamic's performance of a construction contract and provided assurances that Dynamic's subcontractors

would be paid.

Dynamic subsequently failed to pay one of the subcontractors on the Archbold project. A claim was made against the bond, and INA was required to pay the subcontractor $433,635.34.

INA then brought suit in the district court to recover from Dynamic and the Kowals. Finding the indemnity agreements unambiguous, the district court entered summary judgment in favor of INA. The company was also awarded its attorney fees.

A subsequent order -- the first of those involved in the present appeals -- covered further costs and attorney fees incurred by INA in its efforts to satisfy the judgment. Mr. Kowal moved for rehearing or reconsideration, contending that the fees awarded were unreasonable in amount. He also moved that he be allowed to pay the judgment in installments. Both motions were denied, and these appeals followed.

II

A. Attorney Fees

Mr. Kowal did not raise the issue of the reasonableness of the attorney fees until he moved for reconsideration. The issue was raised too late to be preserved for appeal. See American Meat Institute v. Pridgeon, 724 F.2d 45, 47 (6th Cir. 1984).

Even if the issue were properly before us, we would uphold the award. An abuse of discretion standard would apply under both federal and Michigan law -- see Tiemeyer v. Community Mutual Insurance Co., 8 F.3d 1094, 1101-1102 (6th Cir. 1993), cert. denied, 114 S. Ct. 1371 (1994); Daniels v. Daniels, 418 N.W.2d 924, 928 (Mich Ct. App. 1988) -- and we are satisfied, based on an independent review of the itemized fees, that no abuse of discretion occurred here.

Mr. Kowal asks us to examine several other issues pertaining to the fee award, but we decline to do so. These issues were

raised for the first time on appeal or, at the earliest, in the motion for reconsideration, and have thus been waived.

B. Installment Payments

The second appeal arises from the district court's denial of the motion filed pursuant to M.C.L. 600.6202 et seq. and M.C.R. 3.104, in which Mr. Kowal sought permission to satisfy the judgment in installment payments.

Michigan Court Rule 3.104 permits a judgment debtor to seek an order providing for satisfaction of the judgment through installment payments in accordance with M.C.L. 600.6201 et seq. Section 600.6205(3) states that "(t]he petition of the defendant shall be supported by the affidavit of the moving party setting forth his inability to pay the judgment with funds other than those earned by him as wages . . . ." (Emphasis supplied.) The granting of permission to pay in installments is discretionary with

the judge. See id., 600.6201.(1) ("The judge . . . may make a written order permitting the defendant to pay the judgment in installments. . . .")(emphasis supplied).

The record of this case shows that Mr. Kowal has sufficient assets to satisfy the INA judgment. Kowal contends that he is entitled to installment relief because he does not have wages to satisfy the judgment and because it is unreasonable to force him to sell his assets. But 600.6205(3), as we have seen, tells us that installment relief is designed to protect a defendant who can show an "inability to pay the judgment with funds other than those earned by him as wages . . . ." Mr. Kowal can show no such inability.

He does not come within the terms of the statute, and the district court did not abuse its discretion in denying the relief sought.

Neither did the district court commit

reversible error in failing to hold a hearing on the installment payment petition. M.C.L. 600.6211(1) refers to a hearing, but does not indicate that the hearing is mandatory. If a hearing was mandatory, the failure to hold it was harmless error, given the magnitude of Mr. Kowal's assets.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 8-CV-72993-DT

INSURANCE COMPANY OF
NORTH AMERICA, a
Pennsylvania Corporation,

Plaintiff,

vs.

DYNAMIC CONSTRUCTION COMPANY,
ANDREW M. KOWAL and MARGARET
A. KOWAL, jointly and severally,

Defendants.

Filed

United States District Court

Detroit, Michigan

April 5, 1993

R. P. Nastwold, Deputy Clerk

MEMORANDUM OPINION AND ORDER

This matter is before the Court on defendant Dynamic Construction Co.'s and defendant Andrew M. Kowal's motion for

reconsideration of the Court January 7, 1993, Order awarding plaintiff its attorney fees pursuant to the Agreement of Indemnity. Defendants also have filed a supplemental motion for reconsideration. Pursuant to E.D. Mich. LR 7.1(h)(2), the Court ORDERS that defendants' motion for reconsideration be disposed of upon defendants' motion and brief and without the Court entertaining oral arguments on the motion.

Local Rule 7.1(h) provides as follows:

> (1) Time. Any . . . motion for rehearing or reconsideration shall be served not later than 10 days after entry of such judgment or order.
>
> . . . .
>
> (3) Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a

correction thereof.

E.D. Mich. LR 7.1(h)(1) and (3).

Defendants' supplemental motion for reconsideration was not filed within 10 days of the January 7, 1993, Order, and thus defendants' supplemental motion for reconsideration and the brief in support of the supplemental motion are ORDERED STRICKEN from the record. The crux of defendants' motion for reconsideration is that the costs and attorney fees awarded to plaintiff were not reasonable, and thus plaintiff is entitled to a reduction of the amount awarded in the January 7, 1993 Order.

Defendants' argument is not persuasive. Although the Court in its January 1993 Order did not expressly state that the costs and the attorney fees sought by plaintiff were reasonable, it is implicit in the Order that the Court found the costs and the attorney fees to be reasonable. If the Court did not find the fees and costs to be reasonable,

the Court would not have issued an Order awarding such costs and attorney fees. Accordingly, pursuant to E.D. Mich. 7.1(h)(3), defendants' motion for reconsideration is DENIED.

IT IS SO ORDERED.

S/ "Lawrence P. Zatkoff"
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

Civil Action No. 88-CV-72993-DT

INSURANCE COMPANY OF NORTH AMERICA, A Pennsylvania Corporation,

Plaintiff,

vs.

DYNAMIC CONSTRUCTION COMPANY ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly and Severally,

Defendants,

and

KAWASAKI ROBOTICS (USA), INC.,

Garnishee Defendant.

Filed

United States District Court

Detroit, Michigan

January 7, 1993

R.P. Nastwold, Deputy Clerk

ORDER

This matter is before the Court on plaintiff's, Insurance Company of North America's ("plaintiff"), motion for costs and attorney fees. Defendant Dynamic Construction Company and defendant, Andrew Kowal, filed a joint response brief. Plaintiff did not file a reply brief. Pursuant to E.D. Mich. LR 7.1(e)(2), the Court ORDERS that plaintiff's motion for costs and attorney fees be disposed of upon the briefs which the parties have submitted and without the Court entertaining oral argument on plaintiff's motion. For the reasons that follow, plaintiff's motion for costs and attorney fees is hereby granted.

Defendants executed an Agreement of Indemnity in which they agreed to indemnify plaintiff for all losses incurred as a result of plaintiff having executed or procured the execution of certain bonds. On March 1, 1989, this Court issued a Memorandum Opinion and Order, in which the

Court held that defendants were liable for losses sustained by plaintiff and that plaintiff was entitled to an award of attorney fees under the Agreement of Indemnity. In Judgments, which were entered June 19, 1989, and September 19, 1989, plaintiff was awarded attorney fees and costs through July 10, 1989.

On June 8, 1990, plaintiff filed a Motion for Assessment of costs and attorney fees for the time period between July 10, 1989 and May 31, 1990. On April 2, 1992, this Court denied plaintiff's motion for costs and attorney fees, without prejudice, on the grounds that plaintiff's motion was not properly supported by sufficient documentation. On April 29, 1992, plaintiff filed a motion for leave to file a late motion for reconsideration, along with the motion for reconsideration of the April 2, 1992 Order. These motions have not yet been ruled upon by the Court. However, both of

these April 29, 1992 motions are made moot by this Order.

Plaintiff seeks the following attorney fees and costs in this case:

September 7, 1989 through May 31, 1990	$ 6,832.90
June 1, 1990 through June 30, 1990	$ 2,365.50
July 1, 1990 through October 31, 1990	$ 2,868.86
November 1, 1990 through June 5, 1991	$ 4,576.30
June 6, 1991 through October 31, 1991	$ 640.00
November 1, 1991 through October 12, 1992	$ 2,306.54
	$19,590.56

Defendants make a two-fold argument. First, defendants contend that the instant motion is untimely. Defendants argue that because plaintiff's motion for reconsideration was untimely that the instant motion is untimely as well. It seems to the Court that defendants are treating the instant motion as one for

reconsideration. However, this is not the case. The Court's April 2, 1992 Order denying plaintiff's motion for costs and attorney fees was done so without prejudice. Accordingly, plaintiff was entitled to file a new motion for costs and attorney fees. Therefore, defendants' first argument is meritless.

Defendants also contend that plaintiff is seeking costs and attorney fees "from the very onset of this litigation including an appeal to the U.S. Court of Appeals." It is clear that plaintiff is not seeking attorney fees from the very onset of this litigation. Plaintiff is only seeking attorney fees from July 10, 1989 through October 12, 1992. The Court awarded plaintiff attorney fees through July 10, 1989. In addition, plaintiff acknowledges that it is claiming a right to attorney fees as they relate to the two appeals in this case. Plaintiff has a right to attorney fees for appellate work

under the Agreement of Indemnity. Accordingly, defendants' second argument also is meritless. Plaintiff's motion for costs and attorney fees in the amount of $19,590.56 is GRANTED.

IT IS SO ORDERED.

S/ "Lawrence P. Zatkoff"

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

This is to certify that on this 13th day of June, 1995 three (3) copies of the foregoing Petition for a Writ of Certiorari were deposited in a United States post office or mailbox, with first-class postage prepaid, addressed to: Lita Masini Popke, Esq., Weisman, Trogan, Young & Schloss, P.C., 30100 Telegraph Rd., Suite 428, Birmingham, MI 48025, attorney for Respondent.

Andrew M. Kowal
In Pro Per for Petitioners

(2)

Supreme Court, U.S.
FILED
AUG 07 1994
OFFICE OF THE CLERK

No. 95-0062

In The

Supreme Court of the United States

October Term, 1995

DYNAMIC CONSTRUCTION COMPANY and ANDREW M. KOWAL,

Petitioners,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LITA MASINI POPKE
Counsel of Record
WEISMAN, TROGAN, YOUNG & SCHLOSS, P.C.
Attorneys for Respondent
30100 Telegraph Road
Suite 428
Bingham Farms, Michigan 48025
(810) 258-2700

7200
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

1. Did the Sixth Circuit and District Court correctly temper the leniency normally given to a *pro se* litigant with Mr. Kowal's familiarity with the legal system?

2. Did the Sixth Circuit and District Court correctly apply Michigan law governing attorney fee awards?

LIST OF PARTIES

This Petition for Writ of Certiorari is brought by Andrew M. Kowal ("Mr. Kowal"), individually, and Dynamic Construction Company, a Michigan Corporation ("Dynamic Construction").

On August 19, 1994, the Sixth Circuit Court of Appeals entered an order requiring that Dynamic Construction obtain legal counsel or the appeal would be dismissed. On September 14, 1994, Robert S. Rollinger appeared "Of Counsel" on behalf of Dynamic Construction. Despite this appearance, however, Mr. Rollinger never filed a single pleading. All pleadings filed in the Sixth Circuit subsequently were filed by Andrew M. Kowal, In Pro Per, on behalf of Defendant/Appellant.

Similarly, Mr. Kowal initially filed this Petition "In Pro Per for Petitioners." This Court, however, required that Dynamic Construction be represented by counsel and rejected the initial Petition. It appears that Petitioners' "new" counsel, Robin M. Kennedy, "ghost wrote" Mr. Kowal's initial filing since he merely placed a label with his name over the pleadings filed by Mr. Kowal.

Respondent, Insurance Company of North America ("INA"), has been represented by Lita Masini Popke since the inception of this case.

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No. 95-0062

In The

Supreme Court of the United States

October Term, 1995

DYNAMIC CONSTRUCTION COMPANY and ANDREW M. KOWAL,

Petitioners,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Insurance Company of North America, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Dynamic Construction and Mr. Kowal.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (January 9, 1995) and the Order Denying Petitioners' Petition for Rehearing (March 15, 1995) are unpublished; however, the orders are reproduced in the Appendix to Petitioners' Petition for Certiorari. (App. 44-53).

The Order of the United States District Court for the Eastern District of Michigan, Southern Division (January 7, 1993), and the District Court's Memorandum Opinion and Order denying Petitioners' Motion for Reconsideration (April 5, 1993) are unpublished; however, the orders are reproduced in the Appendix to Petitioners' Petition for Certiorari. (App. 54-63).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the Sixth Circuit Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 as an appeal as a matter of right.

The jurisdiction of the United States District Court for the Eastern District of Michigan, Southern Division, was invoked pursuant to 28 U.S.C. § 1332(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions involved in this case, nor are there any questions of federal law.

STATEMENT OF THE CASE

On April 8, 1975, Andrew and Margaret Kowal executed an Indemnity Agreement which specified that they indemnify INA from and against every claim, demand, loss, liability, cost, charge, attorney fees, expense, suit, order, judgment or adjudication that the company shall or may for any cause at any time sustain, incur, or become subject to by reason of executing any such bonds."[1] On July 30, 1975, Dynamic Construction Company also executed an Agreement of Indemnity which provided that INA would be indemnified against losses, including attorney fees.

On July 22, 1988, INA filed suit against Andrew Kowal, Margaret Kowal and Dynamic Construction Company in the United States District Court for the Eastern District of Michigan, Southern Division, for indemnification, exoneration and reimbursement. INA filed a Motion for Summary Judgment on October 25, 1988. INA requested both a judgment for amounts already paid by INA pursuant to the Bonds and for the attorney fees incurred.

On March 1, 1989, the District Court issued a Memorandum Opinion and Order granting INA's Motion for Summary Judgment. The District Court held, as a matter of law, that INA

---

1. On page 5 of its Petition, Petitioners state:

> "Both indemnity agreements provide that the indemnitors are liable for INA's attorney fees only if INA is *required* to take legal action to enforce the indemnitors covenant to cover INA's reserve on demand. . . ." Petitioners attempt to slant the language in a way not intended. Moreover, the language referenced has not been raised in any appeal and the agreement speaks for itself.

was entitled to an award of attorney fees. A Judgment was entered on June 19, 1989, which included attorney fees. (Appendix A). On September 19, 1989, Magistrate Morgan also entered an Order awarding INA additional attorney fees. (Appendix B). Neither the March 1, 1989 Order nor the subsequent two judgments were appealed by Mr. Kowal, Mrs. Kowal or Dynamic Construction. The Defendants were represented by counsel at the time.

Following the Judgment entered by the District Court on September 19, 1989, the following motions were filed and ruled upon:

1. February 22, 1990 – Kowal's Motion to Limit Discovery. The Motion was Denied by an Order of the District Court dated March 28, 1990.

2. April 6, 1990 – Kowal's Objection to Magistrate's Decision and Appeal to District Court Judge on Motion to Limit Discovery. The District Court affirmed Magistrate's Order Denying the Motion to Limit Discovery on April 30, 1990.

3. April 11, 1990 – INA's Motion to Compel Production of Documents. An Order was entered on May 2, 1990 requiring Kowal to provide documents.

4. April 27, 1990 – Kowal's Petition for Installment Payments. The Motion was denied on June 22, 1990.

5. May 3, 1990 – Kowal's Motion to Clarify April 30, 1990 Opinion Affirming Magistrate's Order Denying Motion to Limit Discovery. The Motion was denied in an Order dated June 22, 1990.

6. May 10, 1990 – Andrea Coccia's (Mr. Kowal's daughter) Motion to Abandon Garnishment and Seizure of Trust Assets. Threatened litigation was never filed by Ms. Coccia and the Motion was withdrawn.

7. May 16, 1990 – INA's Motion for Order to Show Cause. The Motion was granted and the Order was entered on May 25, 1990.

8. June 1, 1990 – Defendant's Motion and Objection to Entry of an Order Setting Aside Transfer of Assets. The Motion was denied in an Order dated June 22, 1990.

9. June 8, 1990 – INA's Motion for Assessment of Costs and Attorney Fees. The Motion was denied without prejudice on April 2, 1992. The Motion was refiled on October 20, 1992 and granted.

10. June 8, 1990 – INA's Motion for Entry of Judgment Against Garnishee Defendant. The Motion was granted in an Order dated June 22, 1990.

11. June 13, 1990 – Defendant's Motion to Stay Execution of Attachment and Garnishment Pending Appeal. The Motion was denied or rendered moot in an Order of June 22, 1990.

12. June 27, 1990 – Kowal's Motion to Amend Order and Objection to Entry of June 22, 1990 Order. The Motion was denied in an Order dated July 24, 1990 and Defendant was sanctioned pursuant to Federal Rule of Civil Procedure 11.

13. July 3, 1990 – Defendant's Motion for Replevin and for Bond of Replevin. The Motion was denied in Order dated July 24, 1990 and Defendant sanctioned pursuant to Federal Rule of Civil Procedure 11.

14. July 27, 1990 – Motion of Defendants' attorney to withdraw.

15. July 31, 1990 – Defendants' Counter-Motion for Sanctions and Costs Against Plaintiff. The Motion was denied in an Order dated April, 1992 with the court stating that "defendants have engaged in a protracted pattern of harassment, leading the Court to the conclusion that defendants have abused the judicial process."

16. October 20, 1992 – Plaintiff's Motion for Costs and Attorney Fees. The Motion was granted on January 7, 1993.

17. January 22, 1993 – Defendant's Motion for Rehearing or Reconsideration to Amend the January 7, 1993 Judgment. The Motion was denied in Order dated April 5, 1993.

18. Defendant's Petition for Installment Payments. The Motion was denied in an Order dated June 4, 1993.

19. June 30, 1993 – Defendant's Motion for Reconsideration of Order of June 4, 1993. The Motion was denied in an Order dated July 14, 1993.

20. August 10, 1993 – Judgment entered in favor of INA in the amount of $19,590.56 *nunc pro tunc* to January 7, 1993.

In addition to the above-referenced pleadings filed in the District Court, the Defendants also filed five Claims of Appeal with the United States Court of Appeals for the Sixth Circuit, all of which were dismissed. Defendants' Petitions for Rehearing were also denied.

This procedural history is necessary for the Court's evaluation of the issues contained in the Petition for the reason

that the arguments raised by Petitioners were raised on a number of prior occasions and, therefore, were not properly the subject matter of this appeal. Moreover, the Petitioners' protracted history of filing frivolous motions and appeals is also apparent.

Most importantly, the District Court's initial determination that INA was entitled to attorney fees was rendered in a March 1, 1989 Opinion. (Appendix C). This Order was never appealed. INA's entitlement to attorney fees became the law of the case and the subsequent judgments were entered in accordance with the original Order. Any arguments which Petitioners had regarding INA's entitlement to attorney fees under the terms of the Indemnity Agreement cannot be made the subject matter of this appeal by simply reiterating their position again and again throughout a variety of pleadings. Therefore, each of the following arguments raised by Petitioners is not subject to review.[2]

(1) INA is not entitled to fees incurred in connection with post-judgment proceedings.

(2) Post-judgment attorney fees were not incurred "by reason of executing" the bond.

(3) INA may only recover fees if it is required to take legal action; fees for collection efforts are not recoverable.[3]

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2. *See United States v. Alvarez-Sanchez*, __ U.S. __, 114 S. Ct. 1599, 1605 (1994) (If an argument is not specifically raised in either the District Court or the Court of Appeals, the argument is waived below and this Court must decline to address the argument.); *see also, Granfinaciera, S.A. v. Nordberg*, 492 U.S. 33, 38-9 (1989); *Heckler v. Campbell*, 461 U.S. 458, 468-9, n. 12 (1983).

3. This argument is being raised for the first time in connection with this Petition for Writ of Certiorari.

(4) INA's post-judgment action violated the "good faith" provisions of the Indemnity Agreement.

(5) INA should have satisfied its principal judgment from Dynamic assets rather than seeking to collect the judgment from Mr. Kowal individually.

(6) Decisions rendered by the District Court in another case are relevant to the present appeal.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE COURT OF APPEALS HAS NOT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS NOR SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT.

Rule 10 of the Rules of the Supreme Court provides that a review on Writ of Certiorari is a matter of judicial discretion which will only be granted "when there are special and important reasons therefor." U.S. Sup. Ct. Rule 10, 28 U.S.C.A. Of the three reasons outlined in Rule 10 that would be considered by the Court, only the first has arguably been raised by the Petitioners.[4] Rule 10.1(a) states:

(a) When a United States Court of Appeals

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4. At page 23 of the Petition, Dynamic Construction and Mr. Kowal accused the Sixth Circuit of an unwarranted and substantial departure from the accepted and usual course of proceedings in order to sanction a similar departure by the District Court. . .". Petitioners are incorrect.

> has rendered a decision in conflict with the decision of another United States Court Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.* (Emphasis added).

In the present case, there has not been a departure from "the accepted and usual course of judicial proceedings" so as to warrant Supreme Court intervention. The Petitioners' only argument is that the District Court and Court of Appeals incorrectly applied Michigan law or applied an incorrect standard to a *pro se* litigant. Neither of these issues rise to the level that necessitates Supreme Court intervention. "Generally, the Supreme Court will not overturn a decision of the Court of Appeals on a matter of local law unless the appellate court's determination is clearly incorrect." 13 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 810.25-1[3] (2d ed. 1995).

> The Supreme Court cannot undertake to see that every case in a federal court is decided as the state court would have decided it. At best, it must confine its interposition to cases in which a Circuit Court of Appeals has announced a rule, potentially governing a substantial number of other cases, in conflict with the rule announced by authoritative state court decisions.

Huddleston v. Dwyre, 322 U.S. 232, 237 (1944).

The Sixth Circuit Court of Appeals did not "announce a rule" in this case. In fact, it simply determined that the District Court had not abused its discretion under both federal and Michigan law and it was satisfied, based on an independent review of the itemized fees, that no abuse of discretion occurred here." Petitioners' Appendix, p. 50.

II.

THE COURT OF APPEALS AND DISTRICT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE APPLICATION OF STANDARDS TO *PRO SE* LITIGANTS.

Petitioners claim that they were improperly held to the same standards as an attorney in meeting procedural deadlines and requirements for submission of briefs. This is an inappropriate basis upon which to request a Writ of Certiorari. The courts will generally hold *pro se* litigants to less stringent standards in the interpretation of complaints or other formal pleadings. *Haines v. Kerner,* 404 U.S. 519 (1972). *Pro se* litigants, however, must comply with the procedural requirements of the court in which they appear. *Bolden v. Odum,* 695 F.2d 549 (11th Cir. 1983) (Appellant's appeal dismissed by the court because *pro se* litigant failed to file a timely appeal). Moreover, the leniency that a *pro se* litigant is often granted may be tempered by his/her familiarity with the court. More sophisticated *pro se* litigants cannot plead ignorance of the rules with impunity. As stated by the court in *Raitport v. Chemical Bank,* 74 F.R.D. 128 (S.D.N.Y. 1977):

> This is not a case involving an uneducated, naive plaintiff who may have inartistically stated a valid cause of action. See *Haines v Kerner.* . . . Mr. Raitport has spent more time in court than many lawyers. If there existed a viable cause of action against these

defendants, he is capable of discovering it and stating it. As Chief Judge Kaufman once said with respect to another active *pro se* litigant:

> He comes before this court wearing the cloak of a *pro se* applicant and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently on his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves . . . (which) serve only to distract us from important judicial business.

Acker v. Bryan, Docket No. 27240 (2d Cir. June 21, 1963) (Kaufman, J., concurring).

Raitport, 74 F.R.D. at 132.

In the present case, Mr. Kowal was represented by counsel throughout the District Court proceedings prior to the entry of judgment. Since that time, he has represented himself and filed and defended numerous motions as outlined in this brief. The District Court and Court of Appeals exercised extreme leniency

when determining which of the Petitioners' pleadings should be considered. In fact, the District Court even permitted Dynamic to file pleadings without legal counsel.

Furthermore, Respondents verily believe that Mr. Kowal strategically attempted to elicit this Court's "less stringent standard" or at least make it appear as if this is a case of David — Mr. Kowal, *pro se* — versus Goliath — INA and its attorney — by initially filing this Petition as "Andrew M. Kowal, In Pro Per for Petitioners". After seven years of litigation with Mr. Kowal, it was readily apparent that Mr. Kowal did not draft this initial pleading. In fact, after this Court rejected this initial pleading because Mr. Kowal cannot represent Dynamic Construction, Petitioners submitted exactly the same Petition as before except that attorney Robin M. Kennedy's name and address is superimposed with a label over each instance where Mr. Kowal's name had been representing Petitioners "in pro per". Respondent believes that Petitioners submitted a "ghost written" Petition to gain a greater latitude of judicial discretion in this case. In the recent case of *Johnson v. Bd. of Commn's for the Cty. of Freemont*, 868 F. Supp. 1226 (D. Colo. 1994), the United States District Court for the District of Colorado had the opportunity to point out what is so troubling about this issue:

> [P]leadings seemingly filed *pro se* but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The *pro se* litigant would be granted greater latitude as a matter of judicial discretion in

> hearings and trials. The entire process would be skewed to the distinct disadvantage of the non-offending party.
>
> Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P.
>
> What we fear is that in some cases, actual members of the Bar represent petitioners, informally or otherwise, and prepare briefs for them which the assisting lawyers do not sign, and thus escape the obligation imposed on members of the Bar, typified by F.R.Civ.P. 11, but which exists in all cases, criminal as well as civil, of representing to the court that there is a good ground to support the assertions made. We cannot approve of such a practice. If a brief is prepared in any substantial part by a member of the Bar, it must be signed by him. We reserve the right, where a brief gives occasion to believe that the petitioner has had legal assistance, to require such signature, if such, indeed, is the fact.

Id. at 1231-2.

Mr. Kowal's attempt to invoke a more lenient standard is inappropriate. The District Court and Court of Appeals did not treat the Petitioners harshly. Nothing contained within the decisions of the Court of Appeals or the District Court amounts to a departure from the accepted and usual course of judicial proceedings that would warrant the Supreme Court's intervention.

III.

THE COURT OF APPEALS AND DISTRICT COURT DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONNECTION WITH DETERMINING THE REASONABLENESS OF ATTORNEY FEES ESTABLISHED BY INA.

Petitioners' second basis for seeking a Writ of Certiorari argues that the Court of Appeals departed from the accepted and usual course of judicial proceedings and sanctioned such a departure from the District Court by not requiring INA to submit to an evidentiary hearing. This argument as well falls far short of raising an issue for consideration by the United States Supreme Court.

As mentioned earlier, it is not the obligation of the United States Supreme Court to ensure that every decision rendered by a Court of Appeals has been decided as a state court would decide it. The District Court's determination of reasonableness and the de novo review by the Court of Appeals were both soundly supported by Michigan law. In *Wood v. Detroit Auto. Inter-Insurance Exchange,* 413 Mich. 573, 588, 321 N.W. 2d 653 (1982) the Michigan Supreme Court adopted the guidelines for determining the reasonableness of attorneys' fees as set forth in *Crawley v. Schick,* 48 Mich. App. 728, 737, 211 N.W. 2d 217 (1973). The Michigan Supreme Court stated, however, that the trial court need not detail its findings as to each specific factor and further stated that an award of attorney fees "will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion." *Wood* at 588.

The Petitioners have also mis-cited the law with regard to their statement on pages 34 and 35 of the Petition that an

evidentiary hearing to determine the "reasonableness" of attorney fees is mandatory under Michigan law (citing *Maple Hill Apartment Co. v. Robert W. Stein, AIA,* 147 Mich. App. 687, 382 N.W. 2d 849 (1985)). The Michigan Supreme Court has never announced such a mandate.

CONCLUSION

The issues raised by Petitioners fail to demonstrate that the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings and/or sanctions, or that there is such a departure by the District Court so as to call for an exercise of this Court's power of supervision.

WHEREFORE, Respondent respectfully requests this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

LITA MASINI POPKE
Counsel of Record
WEISMAN, TROGAN, YOUNG & SCHLOSS, P.C.
Attorneys for Respondent
30100 Telegraph Road
Suite 428
Bingham Farms, MI 48025
(810) 258-2700

Dated: August 7, 1995.

APPENDIX A — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED JUNE 19, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72993-DT

JUDGE LAWRENCE P. ZATKOFF

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Plaintiff,

-vs-

DYNAMIC CONSTRUCTION COMPANY, ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly & Severally,

Defendants.

PHILLIP G. ALBER P24802
LITA MASINI POPKE P35686
Attorneys for the Plaintiff
2400 First National Building
Detroit, Michigan 48226
Phone: (313) 965-1700

JEANNE STEMPIEN P31381
Attorney for the Defendants
38705 Seven Mile Rd., #250
Livonia, Michigan 48152
Phone: (313) 464-4500

Appendix A

JUDGMENT

At a session of said Court, held in the City of Detroit, County of Wayne and State of Michigan on 19 JUN 1989

PRESENT: LAWRENCE P. ZATKOFF
U.S. DISTRICT JUDGE

This matter having come before the court on INA's Motion for Summary Judgment, and the Court having read the Briefs, and having issued a Memorandum, Opinion and Order on March 1, 1989, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED in accordance with the Court's Memorandum, Opinion and Order of March 1, 1989, that judgment be and the same hereby is entered in favor of the Plaintiff, Insurance Company of North America, and against the Defendants, Margaret A. Kowal, Andrew M. Kowal and Dynamic Construction Co., jointly and severally, in the amount of $29,102.95 which is equal to the $33,635.34 INA paid B.I.F., plus $3,395.40 in attorney fees, costs and expenses, plus $1,888.78 in interest from the date of filing the Complaint through April 14, 1989, minus $9,816.57 setoff for amount paid to INA by Dynamic in connection with another project.

SO ORDERED.

s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED SEPTEMBER 19, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72993-DT

JUDGE LAWRENCE P ZATKOFF

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Plaintiff,

-vs -

DYNAMIC CONSTRUCTION COMPANY, ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly & Severally,

Defendants.

PHILLIP G. ALBER P24802
LITA MASINI POPKE P35686
Attorneys for the Plaintiff
2400 First National Building
Detroit, Michigan 48226
Phone: (313) 965-1700

GREGORY J. STEMPIEN P20971
JEANNE STEMPIEN P31381
Attorney for the Defendants
38705 Seven Mile Rd., #250
Livonia, Michigan 48152
Phone: (313) 464-4500

ORDER DENYING DEFENDANTS' MOTION TO AMEND JUDGMENT, GRANTING INA'S MOTION FOR SANCTIONS; AND ENTRY OF JUDGMENT

Appendix B

At a session of said Court held in the City of Detroit, Michigan on SEP 19 1989

PRESENT: VIRGINIA M. MORGAN

This matter having come before the Court on the Motion of the Defendants to Amend the Judgment, and the Plaintiff, INA, having filed a Response and a Counter Motion for Sanctions, and the Court having reviewed the Briefs, heard oral argument September 11, 1989, and being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the Defendants' Motion to Amend Judgment be and the same hereby is denied.

IT IS FURTHER ORDERED that the Plaintiff's Motion for Sanctions is granted. In addition to the amounts set forth in the Court's Judgment of June 19, 1989, INA is hereby awarded an additional $492.36 in pre-judgment interest from April 14, 1989 to June 19, 1989. INA is also awarded $2,292.00 in additional attorney fees pursuant to the Indemnity Agreement between the parties.

IT IS THEREFORE ORDERED that judgment be and the same hereby is entered in favor of the Plaintiff, Insurance Company of North America, and against the Defendants, Dynamic Construction Company, Andrew and Margaret Kowal, in the additional amounts of $492.36 and $2,292.00 for a total additional judgment of $2,784.36.

SO ORDERED.

s/ VIRGINIA M. MORGAN
MAGISTRATE VIRGINIA MORGAN

Appendix B

"APPROVED AS TO FORM"
s/ Gregory J. Stempien/per auth. 9-12-89
GREGORY J. STEMPIEN P20971
Attorney for the Defendants

s/ Lita Masini Popke
LITA MASINI POPKE P35686
Attorney for the Plaintiff

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MARCH 1, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 88-CV-72993-DT

HONORABLE LAWRENCE P. ZATKOFF

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Plaintiff,

vs.

DYNAMIC CONSTRUCTION COMPANY, ANDREW M. KOWAL and MARGARET A. KOWAL, Jointly & Severally,

Defendants.

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 1st day of March, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Appendix C

INTRODUCTION

Presently before the Court is Plaintiff's Motion for Summary Judgment. Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1986); Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, __, 106 S.Ct. 2548, 2552-2553 (1986). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); *United States v. Diebold*, 368 U.S. 654 (1962); *Cook v. Providence Hosp.*, 820 F.2d 176, 179 (6th Cir. 1987); *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979). In deciding a motion for summary judgment, the Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at __, 106 S.Ct. at 2512. Although summary judgment is disfavored, this motion may be granted when the trial would merely result in delay and unneeded expense. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (5th Cir. 1986). Where the non-moving party has failed to present evidence on an essential element of their case, they have failed to meet their burden and all other factual

disputes are irrelevant and thus summary judgment is appropriate. *Celotex*, 477 U.S. at __, 106 S.Ct. at 2553; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. __, 106 S.Ct. 1348, 1356 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)).

I. FACTS

The plaintiff, Insurance Company of North America (INA), is engaged, in part, in the business of issuing surety bonds. A surety bond in a broad sense is a contract whereby one person (the surety) binds himself to answer for the debt, default, or miscarriage of another (the principal). Nonetheless, as between the principal and the surety who are so bound, it is the principal, rather than the surety, who should perform.

The defendant, Dynamic Construction Company (Dynamic), is a construction company which performs work that often requires that a surety bond be posted. INA often issued these surety bonds on behalf of Dynamic. As partial consideration for the issuance of these bonds, INA required Dynamic and two of its officers, Andrew and Margaret Kowal, to execute indemnity agreements. An indemnity agreement is a contract between two parties whereby one (i.e., the Kowals and Dynamics undertakes and agrees to indemnify the other (i.e., INA) against loss or damage arising from the claim or demand of a third person.

On October 1, 1981, INA issued a Performance Bond on behalf of Dynamic and in favor of the Village of Archbold, Ohio. The principal was Dynamic, the surety INA and the obligee was

the village. The Bond guaranteed the performance of Dynamic on its contract with he Village of Archbold. The Bond also provided guarantees that all subcontractors, materialmen and laborers would be paid.

On June 21, 1982, Dynamic entered into a subcontract with B.I.F. Division of General Signal Controls, Inc. (B.I.F.) to perform certain work and to furnish certain goods and equipment in connection with the contract for the Village of Archbold. Subsequently, Dynamic did not pay B.I.F. in full. Therefore a claim was made against the Performance Bond. B.I.F. filed suit against Dynamic and INA in the United States District Court, Southern District of New York. Pursuant to the litigation, INA paid B.I.F. $33,635.34 on May 20, 1988. In addition, as a result of having executed or procured the execution of the Bond, INA incurred attorney fees and expenses of $3,968.00 through September 30, 1988. (Affidavit of Doreen Wise). Plaintiff seeks judgment in the amount of $27,787.07 which is equal to the $33,635.34 INA paid B.I.F. pursuant to the litigation, plus $3,968.00 for attorneys' fees and expenses, minus $9,816.57 setoff for amounts paid to INA by Dynamic in connection with another project. INA argues that pursuant to the Indemnity Agreements, Dynamic, Andrew Kowal and Margaret Kowal are liable to INA for the money paid by INA to B.I.F., plus attorney fees.

II. LAW AND ANALYSIS

There are four indemnification contracts to which reference has been made in this lawsuit. The first contract, dated April 8, 1975, was executed by Andrew and Margaret Kowal in favor of INA.[1] The second contract, dated July 30, 1975, was executed by Dynamic in favor of INA.[2] The other two contracts were executed

subsequent to INA's issuance of the performance bond in the Dynamic — City of Archbold contract. As such, the Court finds the latter two contracts irrelevant to the case at bar. Neither contract could reasonably be interpreted to be retroactive to the date of the construction contract relevant to this suit. On the other hand, the two preceeding contracts, both executed in 1975, are relevant. These two contracts, dated April 8, 1975 and July 30, 1975 respectively, essentially state that Margaret and Andrew Kowal individually, and Dynamic Construction Co., will indemnify INA for any and every claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication that the company (INA) may incur by reason of executing surety bonds. These two contracts were entered into prior to October 1, 1981, the date INA issued the Performance Bond on behalf of Dynamic in favor of the Village of Archbold, Ohio. The question of whether Dynamic, Andrew or Margaret Kowal are liable rests, in part, on interpretation of the 1975 Indemnity Agreements.

It is well settled under Michigan law that indemnity contracts are construed in accordance with the rules for the construction of contracts generally. *Title Guaranty & Surety Co. v. Roehm*, 215 Mich. 586, 184 N.W. 414 (1921); *Meadows v. Depco Equipment Co.*, 4 Mich. App. 370, 144 N.W. 2d 844 (1966); *Paquin v. Harnischfeger Corp.*, 113 Mich. App. 43, 317 N.W. 2d 279 (1982). Contracts generally must be construed to effectuate the intention of the parties who are bound by all of the terms of the executed contract. 17 Am. Jur. 2d "Contracts," 59. Indemnity contracts, like other contracts, are to be enforced so as to effectuate the intention of the parties. *Calladine v. Hyster Co.*, 155 Mich. App. 175, 399 N.W. 2d 404 (1986).

Appendix C

III. DEFENDANTS' ARGUMENTS

The defendants have raised several arguments in support of their contention that they should not be held liable under the terms of the indemnification contracts.

A.

Defendants' first argument is that the April, 1975 contract does not contain any language indicating that execution of subsequent indemnity agreements would not have an effect on the enforcement of the April, 1975 contract. Therefore, defendant contends it would be reasonable for the Kowals to expect that subsequent documents of indemnity executed by Dynamic would eliminate their personal liability. This argument is completely without merit. Execution of subsequent indemnity agreements by a different party does not discharge the first party's obligation. As stated in 41 Am. Jur. 2d, "Indemnity," § 37, the receipt of an indemnity bond from a subsequent indemnitor does not supersede a prior agreement of indemnity by another person or discharge the obligation of the first indemnitor. Therefore, regardless of the July 30, 1975 Indemnity Agreement executed by Dynamic, Andrew and Margaret Kowal remained personally liable under their April, 1975 Indemnity Agreement.

B.

The Kowals also argue that they were "personally" released from the indemnity contract as a result of a letter sent by INA's agent, Knox Branden. The letter, dated April 30, 1982, states that the Kowals personal backing was eliminated by the execution of the subsequent April 27, 1982 contract by Dynamic. Likewise, this argument is without merit. Regardless of INA's agent's

statement, the April, 1975 Indemnity Agreement under which the Kowals are individually liable remained in full force and effect "until ten days after receipt by the company of written notice by registered mail addressed ... revoking this Agreement of Indemnity. . . ." (Indemnity Agreement dated April 8, 1975). Under the clear language of the April 8, 1975 Agreement of the individual defendants, their liability could not be extinguished unless notice was sent to the company. No such notice was sent. Even if notice had been sent, the release would have only been prospective from the date of the notice and would not have applied to any bonds previously executed. In this case, the Indemnity agreement under which the Kowals are personally liable was executed in 1975. The relevant Performance Bond was issued in 1981. Therefore, even if the April 30, 1982 letter effectively discharged the Kowals from their 1975 Agreement, it would only have done so prospective from the date of the letter and would have no effect on the 1981 Performance Bond.

C.

Next, defendants question whether a legitimate bond claim was made by B.I.F. because the Bond states that it was a performance bond and not a payment bond. Simply, the language of the bond states that all lawful claims of subcontractors, materialmen and laborers must be paid. The language of the bond clearly states that INA was obligated to pay where the principal did not. In this regard, the language of the Indemnity Agreements entered into between the parties must be construed to give full effect to the unambiguous terms. *Giguere v. Detroit Edison Co.*, 114 Mich. App. 452, 319 N.W. 2d 334 (1982).

In addition, defendants claim that the payment by INA to B.I.F. was not made in good faith because INA did not assert the

defenses of Dynamic and did not give notice to Dynamic of payment. First of all, it is clear that INA did not assert of defenses of Dynamic prior to making payment to B.I.F. because Dynamic had waived those defenses by entering into a settlement agreement and having a judgment entered against it. A surety may assert only those substantive defenses on the bond itself. *Ackron Contracting v. Oakland County,* 108 Mich. App. 767, 310 N.W. 874 (1981). Furthermore, once a judgment is entered against a principal, that judgment is *prima facie* evidence of liability against the surety. It is the opinion of this Court, therefore, that since defendant was represented by counsel, entered into a settlement agreement and had judgment entered against it, Dynamic waived its defenses.

E.

The defendants also argue that INA's payment was not made in good faith because Dynamic was not notified of the payment. This argument is groundless. The indemnity agreement executed by Dynamic on July 30, 1975 provides that the surety shall have the right to pay any judgment without the consent or approval of the contractor. Also important, is the fact the Dynamic was involved in litigation with the subcontractor whose judgment was paid by INA. As such, Dynamic is hard pressed to argue bad faith and rely on lack of knowledge of its surety's actions when Dynamic itself was involved in the litigation from which the payment was made.

F.

Lastly, defendants' argument that both indemnity agreements entered into in 1975 were unconscionable and adhesive is outrageous. The Court finds it unnecessary to address such a groundless contention.

Appendix C

CONCLUSION

Therefore, the Court finds the defendants Margaret Kowal, Andrew Kowal and Dynamic Construction Company jointly and severally liable for the losses sustained by INA on the Performance Bond dated October 1, 1981. With regards to the attorneys' fees, however, the court will reserve judgment until the plaintiff thoroughly documents such fees in regards to its claim. Plaintiff shall have 10 days from the date of the Opinion to submit a proposed judgment and documentation of attorneys' fees. Defendant shall then have 7 days to file any objection thereto.

IT IS SO ORDERED.

s/ L.P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

[stamped]
Pursuant to Rule 77(d), FRCivP
COPIES HAVE BEEN MAILED TO THE
FOLLOWING:
Atty. Phillip G. Alber
Atty. Jeanne Stempien
on March 1, 1989
s/ R.P. Nastwold
DEPUTY CLERK

Appendix C

FOOTNOTES

1. The agreement reads in pertinent part:

> 3. That the Indemnitor [Andrew and Margaret Kowal] will perform all the obligations of any such bond(s) and will at all times indemnify and keep indemnified the Company [INA] from and against every claim, demand, loss, liability, cost, charge, attorneys' fee, expense suit, order, judgment or adjudication that the Company shall or may for any cause at any time sustain, incur or become subject to by reason of executing any such bond(s). (Emphasis added).
>
> 4. That the Indemnitor's liability hereunder shall, without however limiting the indemnity provided in the preceding paragraph, extend to and include all costs, expenses and attorneys' fees incurred or sustained by the Company in making any investigation on account of any such bond(s), in prosecuting or defending any action brought in connection therewith, in obtaining or seeking to obtain a release therefrom and in enforcing any of the agreements herein contained.

2. The agreement reads in pertinent part:

> SECOND: That Contractor shall perform all the conditions of such bond(s), and any and

all renewals and extensions thereof, and shall at all times indemnify and save the Company harmless from and against any claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication and shall place the Company in funds to meet every such claim, demand, loss, liability, cost, charge, attorneys' fee, expense suit, order, judgment or adjudication by reason of such bond(s) and all renewals and extensions thereof, before it shall be required to make payment. (Emphasis added).